85-1504

No. .....

Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

MARITIME OVERSEAS CORPORATION, AND SECOND SHIPMOR ASSOCIATES,

Petitioners,

v.

WALTER J. BRUNNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TERRIBERRY, CARROLL & YANCEY,
of Counsel

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QUESTIONS PRESENTED FOR REVIEW

I. Do separate theories of recovery, based upon negligence and unseaworthiness, relieve the court of its obligation to review a special verdict to determine if inconsistent jury findings can be reconciled?

II. If a vessel's deck has been determined not to be in any manner unsafe or unfit, can a shipowner be found negligent because of the condition of the deck?

LIST OF PARTIES

A. Those parties listed in the caption of this case.

B. The following are companies interested in or affiliated with Petitioner(s) or the *SS Overseas Ohio:*

1. San Jose Tankers Inc.
2. Moran Tankships No. 2, Inc.
3. OSG Bulk Ships, Inc.
4. Overseas Shipholding Group, Inc.
5. F.C.L. Ship Five, Inc.
6. First Chicago Leasing Corporation.
7. Manufacturers Hanover Trust Company.
8. CIT Corporation.
9. Assuranceforeningen GARD.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maritime Overseas Corporation and Second Shipmor Associates, respectfully pray that a writ of certiorari issue to review the decision rendered in this case by the United States Court of Appeals for the Fifth Circuit.

———o———

OPINIONS BELOW

The Jury Interrogatory form, with answers, appears as Appendix A.

The District Court Judgment appears as Appendix B.

A copy of the order denying Petitioners' Motion for New Trial appears as Appendix C. The Lower Court did not render a written opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 779 F.2d 296, appears as Appendix D. No petition for rehearing was sought from the Fifth Circuit.

The judgment of the Fifth Circuit appears as Appendix E.

———o———

JURISDICTION

The opinion and judgment in the United States Court of Appeals for the Fifth Circuit was rendered in this case on January 3, 1986. This petition for writ of certiorari was filed within 90 days of January 3, 1986, as is

required by 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1254(1).

———o———

STATUTES AND RULES INVOLVED

1. The Jones Act, 46 U.S.C. § 688, states:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . . ."

2. The Federal Employers' Liability Act, 45 U.S.C. § 51, which governs railway employers, states that the employer shall be liable for:

> "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

———o———

STATEMENT OF THE CASE

I. The Proceedings Below

In this seaman's personal injury claim, plaintiff alleged injuries to his back as a result of a slip and fall aboard the *SS Overseas Ohio* on a rainy night in June, 1978. Plaintiff contended that the reason for his fall was the presence of a 10-foot wide patch of oil on the deck of the *SS Overseas Ohio* in the area where one would normally walk from the gangway to the vessel's house. The claimed presence of the oil was the sole allegation of negligence and the sole allegation of unseaworthiness.

The matter went to trial before a jury on June 14 and 15, 1984, on both the negligence and unseaworthiness theories. The jury returned with a special interrogatory verdict finding the vessel was not unseaworthy, but nevertheless finding defendants negligent.

Judgment was entered in favor of plaintiff and against defendants. Defendants thereafter moved the lower court to set aside the judgment on the basis of the inconsistency of the findings of negligence and of seaworthiness. The motion was denied and a timely appeal was taken by defendants to the United States Court of Appeals for the Fifth Circuit.

Oral argument was held before the appellate court and an opinion was rendered on January 3, 1986, affirming the judgment of the district court. It is for review of that affirmance that petitioners seek a writ of certiorari.

II. Statement of Relevant Facts

Walter Brunner, plaintiff, was serving on the *SS Overseas Ohio* as a third assistant engineer. The *SS*

Overseas Ohio was a relatively new ship, having been delivered to the owners less than nine months before the incident.

Plaintiff claimed that his accident occurred at night, while it was raining, when he returned to the vessel from shore leave in Panama. He was walking aft on the vessel's main deck proceeding from the gangway to his quarters. When he was en route to the vessel's house, allegedly he slipped in a 10-foot wide patch of oil on the deck.

There was no evidence of any malfunction of the ship's equipment or of any defect that could have allowed oil to appear on deck as claimed by plaintiff. It had been four days since any cargo of oil had been on the vessel. There was no fuel oil being transferred nor could it have been transferred forward of the house to the area where plaintiff claimed he slipped.

While all of the witnesses at trial admitted that it was not proper for there to have been oil on the vessel's deck, no one other than plaintiff claimed to have seen any oil on deck. No one could give any explanation of how the oil could have appeared on the deck. Plaintiff himself could not explain the source of the oil.

Throughout the trial, the only liability issue was whether there was oil on the deck where plaintiff claimed to have slipped. The opening statements, the evidence, and the closing arguments were all directed to the issue of whether there was oil on the deck. The judge's charge to the jury limited the issue to whether this claimed oil actually was on the deck.[1] From beginning to end, there was one and

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[1] Excerpts from the opening and closing statements and from the charge are attached as Appendices F and G.

only one pivotal fact issue: was there oil on the deck where plaintiff claimed he slipped?

The jury was given a special interrogatory form asking separate questions about negligence, unseaworthiness, causation, contributory negligence, and damages. After deliberating, it returned with a verdict finding negligence, but finding no unseaworthiness, and awarding plaintiff no damages. The judge immediately sent the jury back and ordered them to answer the question on damages. The jury returned, and following the instructions of the judge awarded damages of $75,000.

Judgment was entered for plaintiff. Defendants moved for a new trial because of the inconsistent verdict. The motion for a new trial was denied, and the lower court was affirmed on appeal in the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

Petitioners seek review of the Fifth Circuit's affirmance of a judgment based on a verdict that we believe is plainly inconsistent. The Fifth Circuit has effectively held that the shipowner can be found negligent for a condition despite the fact that the condition did not render the vessel unsafe or unfit in any manner.

In so holding, the Fifth Circuit erred:

(1) By its failure to review properly the obvious inconsistency of the verdict, limiting its inquiry to the inappropriate idea that the conflict in the jury's answers involved two separate theories of alleged liability; or

(2) If it did properly examine the inconsistency of the verdict, it incorrectly extended the obligation of the shipowner under the Jones Act to a new, and unprecedented, and obviously erroneous level, by holding that a shipowner may be found negligent for failing to correct a condition which is reasonably safe, that is, seaworthy.

The initial proposition is contrary to traditional notions of due process and the fundamental rule that a court has no authority to enter judgment upon a verdict which is not reasonably clear and unambiguous. The second proposition is an unsustainable extension of the doctrine of negligence, making negligence stricter than strict liability (unseaworthiness), utterly contrary to the negligence standard on which the Jones Act claim has to be based, and contrary to this Court's precedent.

I. A writ should issue because the Fifth Circuit has effectively held that a claim brought under two different theories of recovery can support a judgment notwithstanding the plain fact that the jury's answers to the interrogatories are irreconcilably inconsistent under the facts of the case.

Raising the talismanic flag of separate theories of recovery, the Fifth Circuit found no inconsistency in simultaneous findings that the vessel's deck was reasonably safe and fit, but that the shipowner acted negligently in failing to make the deck reasonably safe and fit. The rationale of the Fifth Circuit's holding was that because theories of unseaworthiness and Jones Act negligence are "separate", there is no inconsistency where a jury finds liability upon one theory (the situs was negligently unsafe), but finds simultaneously that the situs was safe and fit.

Such a view completely ignores the fact that both theories of recovery in this case, as in many cases with multiple theories of recovery, arise from a single factual situation.

It is true that the concepts of seaworthiness and negligence have evolved under maritime law as distinct and separate theories of recovery. Yet, "the Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery." Gilmore & Black, *The Law of Admiralty*, p. 383 (2nd Ed. 1975). This Court has recognized that the claims are alternative "grounds" for a single cause of action. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225, 2 L.Ed.2d 1272, 1276 (1958).

In a trial situation, a jury is required to consider the underlying factual basis common to both theories. The

duty and power of the court to review resulting verdicts, however, is not restricted by any "Chinese wall" separating different legal but identical factual theories of recovery. A verdict must make sense in order to support a judgment, regardless of how many legal theories are presented. If the verdict is hopelessly flawed, judgment should not be entered.

On the underlying facts of this case, there can be no reasonable or sensible explanation for the jury's finding that the shipowner was negligent in failing to remedy an unsafe condition of the vessel's deck where the deck condition was at the very same time found to be reasonably fit and safe. The verdict is inconsistent.

The Fifth Circuit, in its attempt to uphold the verdict, has ignored the absolutely irreconcilable character of the two answers, and has departed from traditional notions of fairness and due process by affirming a judgment on this inconsistent verdict. Because such action is in conflict with traditional notions of justice, petitioners pray that a writ of certiorari issue.

II. The Fifth Circuit's decision is in direct conflict with decisions of the United States Courts of Appeals for the First, Second, and Fourth Circuits, and is contrary to similar decisions of the Third, Eighth, and Eleventh Circuits.

The same issue has been previously considered, both in the context of the consistency of verdicts and in the context of the propriety of directed verdicts. If a directed verdict is given after the jury finds there to be no unseaworthiness, the same fundamental issue is presented to the Court: does the finding of seaworthiness obviate the

necessity of the jury's determining the question of negligence when the sole allegation of negligence is that the shipowner failed to maintain its vessel in a reasonably safe condition?

The Fifth Circuit, citing *Kokesh v. American S.S. Co.*, 747 F.2d 1092 (6th Cir. 1984), in support of its position, nevertheless recognized that its holding was directly contrary to the Second Circuit's *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660 (2nd Cir. 1975). The Second Circuit there considered the issue in its review of an inconsistent verdict. There, as here, the question was also the alleged presence of oil on deck. The jury had found negligence but no unseaworthiness, and the court concluded that the answers could not possibly be reconciled. Special verdicts should be reconciled wherever possible, but " . . . there must be a limit where, as here, the special verdicts are quite irreconcilable, the plaintiff's case is tenuous, and the suspicion strong that the judgment was predicated upon confusion or sympathy or both."

In a directed verdict context, the same issue was considered by the First Circuit in *Peymann v. Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974), *cert. denied*, 421 U.S. 914, and the same result reached. See also *Meyers v. Isthmiam Lines, Inc.*, 282 F.2d 28 (1st Cir. 1960), *cert. denied*, 365 U.S. 804, 5 L.Ed.2d 461 (1961).

The Fourth Circuit spoke to the same issue with the same result in *Blankenship v. Ellerman's Wilson Line New York, Inc.*, 265 F.2d 455 (4th Cir. 1959). There, the jury found the vessel seaworthy, and the court granted

summary judgment, on the same facts, on the negligence theory.[2]

Similar considerations have governed cases in non-maritime fields where multiple theories of recovery have led to inconsistent verdicts. *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984); *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155 (8th Cir. 1978); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3rd Cir. 1983); *Werner v. Upjohn*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080, 66 L.Ed.2d 804 (1981).

The Courts of Appeals are thus clearly seen to be in conflict on their ability to give effect to concurrent jury findings of negligence and unseaworthiness (strict liability). Because Jones Act negligence and unseaworthiness claims are usually combined in a single trial, this conflict needs to be resolved by this Court.

III. A writ should issue because the Fifth Circuit has extended the shipowner's obligation under the Jones Act beyond the well-settled construction and application of the statute, thereby making the shipowner the virtual insurer of a seaman.

If it is assumed, *arguendo*, that the Fifth Circuit did go beyond the "separate theories of recovery" basis in its determination that the findings of the jury were consistent, then its holding necessarily implies that the Jones Act negligence standard is even stricter than that of strict liability. In other words, even though a shipowner may

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[2] District courts in the Third Circuit are also in agreement. See *Nosal v. Calmar S.S. Corp.*, 339 F.Supp. 1235 (E.D.Pa. 1972), aff'd without opinion 475 F.2d 1395 (3rd Cir. 1973); *Poller v. Thorden Lines A/B*, 336 F.Supp. 1231 (E.D.Pa. 1970).

keep the deck of its vessel fit and safe in every manner, it nevertheless can be held liable under some theory of "negligence." Such has never been the law, was never intended to be the law, and cannot be the law.

Long standing precedent interpreting negligence under the Federal Employers' Liability Act and the Jones Act requires that there be some breach of duty on behalf of the employer before the general damages provided for by the statutes can be awarded. *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 4 L.Ed.2d 198 (1959); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377-78, 77 L.Ed. 368, 374-375 (1932). Under the facts of the instant case, with the vessel having been found seaworthy, there simply was no breach of any duty owed to plaintiff. There was not and is not any way that the verdict properly could be construed as consistent.

———o———

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

CIVIL ACTION NO. 82-4645

SECTION "I"

WALTER R. BRUNNER
VERSUS
MARITIME OVERSEAS CORPORATION,
SECOND SHIPMOR ASSOCIATES, ET AL

We, the Jury in the above-captioned action, unanimously find as follows:

1. Do you find from a preponderance of the evidence that the Defendants, Maritime Overseas Corporation and Second Shipmor Associates, were negligent at the time of the Plaintiff's accident? Answer "Yes" or "No."

   Answer *Yes*

   If you have answered Question No. 1 "Yes," proceed to Question No. 2. If you have answered Question No. 1 "No," DO NOT answer Question No. 2. Proceed, instead, to Question No. 3.

2. Do you find from a preponderance of the evidence that the Defendants' negligence was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

   Answer *Yes*

   However you have answered Question No. 2, proceed to Question No. 3.

3. Do you find from a preponderance of the evidence that the S/S OVERSEAS OHIO was unseaworthy at the time of the Plaintiff's accident? Answer "Yes" or "No."

   Answer *No*

If you have answered Question No. 3 "Yes," proceed to Question No. 4. If you have answered Question No. 3 "No," DO NOT answer Question No. 4. Proceed, instead, to Question No. 5.

4. Do you find from a preponderance of the evidence that the vessel S/S OVERSEAS OHIO's unseaworthiness was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

Answer *No*

However you have answered Question No. 4, proceed to Question No. 5.

Answer Question No. 5 only if you have answered "Yes" to either or both Question No. 2 and Question No. 4. Otherwise, sign and date the verdict form and return to the Courtroom.

5. Do you find from a preponderance of the evidence that the plaintiff was contributorily negligent? Answer "Yes" or "No."

Answer *Yes*

If you have answered Question No. 5 "Yes," proceed to Question No. 6. If you have answered Question No. 5 "No," DO NOT answer Question No. 6. Proceed, instead, to Question No. 8.

6. Do you find from a preponderance of the evidence that the Plaintiff's contributory negligence was a legal cause of his injuries? Answer "Yes" or "No."

Answer *Yes*

If you have answered Question No. 6 "Yes," proceed to Question No. 7. If you have answered Question No.

6 "No," DO NOT answer Question No. 7. Proceed, instead, to Question No. 8.

7. To what extent did the Plaintiff's contributory negligence cause his injuries? Answer in terms of a percentage (0% to 100%).

Answer *50%*

However you have answered Question No. 7, proceed to Question No. 8.

8. If you have answered "Yes" to either or both Question No. 2 or Question No. 4, what amount, by a preponderance of the evidence, do you find will adequately compensate the Plaintiff for his injuries? DO NOT reduce the amount in the event that you have found the Plaintiff was contributorily negligent. If any reduction is appropriate, the Court will make the reduction. Answer by means of a numerical figure.

$75,000

However you have answered Question No. 8, please sign and date the verdict form and return to the courtroom.

6/15/84
Date

/s/ Mrs. Wanda D. Kennedy

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 82-4645

SECTION: I

WALTER R. BRUNNER

VERSUS

MARITIME OVERSEAS CORPORATION and
SECOND SHIPMOR ASSOCIATES

J U D G M E N T

This matter came on for jury trial on a previous day. Now therefore, considering the answers of the jury to the interrogatories propounded to them, and further considering the direction of the Court as to the entry of judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Walter R. Brunner, and against defendants, Maritime Overseas Corporation and Second Shipmor Associates, in the amount of $37,500.00, plus legal interest and costs.

New Orleans, Louisiana, this 19 day of June, 1984.

/s/ Henry A. Mentz, Jr.
United States District Judge

Date of Entry June 19, 1984

APPENDIX C

82-4645

(2)

SEAMAN CASE
JURY

WALTER R. BRUNER

Plaintiffs

v.

MARITIME OVERSEAS CORPORATION and John Doe, the said name being fictitious, the true identity of the defendant being presently unknown

SECOND SHIPMORE ASSOCIATES

Defendants

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

46 USC 688—INJURY, MARINE, SEAMAN, JONES ACT

TRANSFER CASE FROM SOUTHERN DISTRICT OF NEW YORK TO THE EASTERN DISTRICT OF LOUISIANA

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WEDNESDAY, JULY 18, 1984 10:00 A.M.

11. MOTION OF DEFT, MARITIME OVERSEAS CORPORATION AND SECOND SHIPMOR ASSOCIATES, TO SET ASIDE VERDICT AND FOR NEW TRIAL:

Argument—Denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALTER R. BRUNNER,

Plaintiff-Appellee,

v.

MARITIME OVERSEAS CORP. SECOND
SHIPMOR ASSOCIATES, Et Al.,

Defendants-Appellants.

No. 84-3569

OPINION

Filed January 3, 1986

Before Thomas M. Reavley, Jerre S. Williams and Patrick E. Higginbotham, Circuit Judges.

Opinion by Judge Jerre S. Williams

Appeal from the United States District Court
for the Eastern District of Louisiana
Henry A. Mentz, Jr., District Judge, Presiding

OPINION

JERRE S. WILLIAMS, Circuit Judge:

This case raises the issue of whether different answers to negligence and unseaworthiness interrogatories in a maritime personal injury case constitute an inconsistent verdict. Because negligence and unseaworthiness are totally separate concepts, we find no conflict and affirm.

Appellee Walter R. Brunner brought the present action against appellants Maritime Overseas Corporation and Second Shipmor Associates under the Jones Act, 46 U.S.C. § 688, seeking damages for injuries sustained when he slipped and fell on board the S/S OVERSEAS OHIO. Brunner alleged that his fall was caused by the "treacherous" condition of the deck due to an oil spill. The case was tried to a jury. The only factual issue in the case was whether there was an oil spill on the deck the night that Brunner slipped.

The jury was asked special interrogatories concerning: (1) whether the vessel was unseaworthy; (2) whether there was negligence; and (3) the quantum of damages. The district court instructed the jury in the charge that unseaworthiness and negligence were separate theories of recovery. It is clear in the record, however, that the sole basis of both the unseaworthiness and Jones Act negligence claims was the oil spill, and the judge acknowledged in the charge that appellee's claims were both based upon the same oil spill.

The jury found that appellants were negligent and also found that the S/S OVERSEAS OHIO was not unseaworthy at the time of appellee's accident. They found Brunner to be fifty percent contributorily negligent. The jury at first declined to award any damages, and was sent back for further deliberation by the judge. The jury then awarded $75,000 damages. The judge entered judgment for appellee in the amount of $37,500 representing the 50% negligence attributable to appellants. The district court denied appellants' motion for new trial, which urged that the jury's answers to the interrogatories were inconsistent. We affirm the judgment based upon the jury verdict.

I.

[1] The threshold question is whether appellants have preserved their error. At the time the charge was given to the jury, appellants did not object to the charge on the ground that the interrogatories could result in inconsistent answers. Appellants also did not object when the verdict was returned. The consideration of this issue would have been better served if appellants had made their objection at least at the time that the jury returned its verdict so that the court could evaluate whether or not it was inconsistent and could have sent it back to the jury to reconsider. But, appellants did not waive their right to complain of inconsistent answers by failing to object. If answers to jury interrogatories are in irreconcilable conflict, then the judge has no authority to enter judgment based upon those answers. *Fugitt v. Jones,* 549 F.2d 1001, 1005 (5th Cir. 1977). Thus, failure to object does not waive the right to raise the issue in a motion for new trial when answers to interrogatories result in irreconcilable conflict. *Guidry v. Kim Manufacturing Company,* 598 F.2d 402, 407 (5th Cir. 1979), *cert. denied,* 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980); *Mercer v. Long Manufacturing NC, Inc.,* 671 F.2d 946, 947 (5th Cir. 1982); *Alvarez v. J. Ray McDermott,* 674 F.2d 1037 (5th Cir. 1982). We conclude that appellants have met the procedural requirement to raise the inconsistent verdict claim.

II.

The issue on the merits which is raised by this appeal is whether a jury finding of negligence is consistent with a jury finding of no unseaworthiness when there is but one factual circumstance on which both findings can be based.

In light of the separate nature of the negligence and unseaworthiness causes of action, we find no irreconcilable conflict.

Separate Causes of Action

The history of the unseaworthiness claim shows that it developed independently of Jones Act negligence and has been treated as a separate cause of action ever since. The origin of the seaman's right to recover for injuries caused by an unseaworthy ship can be found in European and English law dating back to 1597.[1] The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. Mariners were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which would otherwise result in a forfeiture of their right to wages.

In the late nineteenth century, American admiralty courts developed the doctrine that a seaman had a right to recover for personal injuries beyond maintenance and cure. It became generally accepted that a shipowner was liable to a seaman injured in the service of a ship as a consequence of the owner's failure to provide a seaworthy vessel. *See The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903).

[2] In 1920, Congress passed the Jones Act. This act gave recovery to seamen for injuries sustained through the negligence of the shipowner. Two years later, in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66

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[1]This historical discussion is taken in substance from the Supreme Court opinion in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).

L.Ed. 927 (1922), the Court made its first statement that seaworthiness was unrelated to the standard of ordinary care which applies in a personal injury case. In *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), the Court gave an unqualified stamp of approval to the view that the duty of the shipowner and his agents to provide a seaworthy ship is unrelated to the jurisprudential concept of negligence. The Supreme Court has steadfastly adhered to the principle that unseaworthiness is a completely separate concept from negligence. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971); 1B Benedict on Admiralty § 23 (1984); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 932, 4 L.Ed.2d 941, — (1960) ("From that date to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.").

Inconsistent Answers?

We examine whether the answers to the jury interrogatories in the present case are irreconcilable keeping the separate historical development of negligence and unseaworthiness in mind. In *Kokesh v. American Steamship Co.*, 747 F.2d 1092 (6th Cir. 1984), the Sixth Circuit Court of Appeals has recently held that findings of seaworthiness and negligence based upon a single factual allegation are not inconsistent. In *Kokesh*, the plaintiff alleged that he slipped and fell on a ship due to an accumulation of polluted water on the deck. He sought damages based upon both negligence and unseaworthiness. The jury found

the vessel to be seaworthy, but awarded damages for negligence just as did the jury in the case before us. The Court held that the jury findings could be reconciled because "[t]he jury could have concluded from the proof that although the defendant did not exercise ordinary care in allowing the deck to be made slippery by overflow from the vessel's ballast tanks, the flooding of the deck did not make the vessel unseaworthy." *Id.* at 1094. Thus, *Kokesh* held unequivocally that the verdicts were not inconsistent. The Second Circuit Court of Appeals has held to the contrary in *Bernardini v. Rederi A/B Saturnus,* 512 F.2d 660 (1975).

[3] The *Kokesh* holding is in agreement with the decision of the district court in this case. We conclude that the district court has not erred. Unseaworthiness and negligence are two separate grounds of recovery. *See Alvarez,* 674 F.2d at 1041; *Thezan v. Maritime Overseas Corp.,* 708 F.2d 175, 180 (5th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 729, — L.Ed.2d — (1984). In the present case, the jury was instructed that these were two separate theories of recovery. The jury could well have concluded that the shipowner was negligent for allowing oil on the deck of his ship, but that oil on the deck of the ship did not render the vessel unfit to go to sea. The jury has the power to determine what facts constitute unseaworthiness just as it has the power to decide if there was negligence.

Appellants urge that the jury's answers are illogical because a "yes" answer to the negligence interrogatory necessarily found oil on the deck, while a "no" answer to the unseaworthiness interrogatory necessarily found no oil on the deck. However, as Emerson noted, "A foolish

consistency is the hobgobblin of little minds.'"[2] Although these answers may not achieve legal nicety, they are not irreconcilable. We do not have the right to second guess a jury that may decide a small oil spill on a deck does not necessarily make an 80,000 ton tanker unseaworthy even if the spill got there negligently. The Supreme Court observed in *Mitchell* that experience will sometimes triumph over logic:

> There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic, but in view of the decisions in this Court over the last fifteen years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

362 U.S. at 550, 80 S.Ct. at 933, 4 L.Ed.2d at 948.

[4] In the present case, the jury answers to the negligence and unseaworthiness interrogatories are not in irreconcilable conflict. Rather, they represent differing answers to two separate theories of recovery. The judgment was properly based upon the jury verdict. It must be upheld.

AFFIRMED.

---

[2]R. W. Emerson, *Self-Reliance* (1841). Emerson also remarked, "With consistency a great soul has simply nothing to do." *Id.*

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3569

D.C. Docket No. CA82-4645-I

WALTER R. BRUNNER,

Plaintiff-Appellee,

versus

MARITIME OVERSEAS CORPORATION SECOND SHIPMOR ASSOCIATES, ET AL.,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

Before REAVLEY, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 3, 1986

ISSUED AS MANDATE:

APPENDIX F

EXCERPTS FROM OPENING AND CLOSING

A. *Plaintiff's opening statement:*

Plaintiff was "caused to slip and fall onto his back, while walking on the deck of that vessel because of an accumulation of oil that had not been properly removed and had been allowed to remain on that vessel. And as a result of that incident, Mr. Brunner suffered the injuries for which he has brought suit and which is the subject of this lawsuit. That's it in a nutshell. That's what the evidence will show". . . .

Transcript, p. 4

"At the end of trial, I will come back to you and at that time I will ask you make an award of money damages to Mr. Brunner to compensate him in this case for the injuries which we will prove to you was caused by the negligence of his employer and by the unseaworthiness of the vessel on which he was working, because we will prove to you that Mr. Brunner was caused to fall because an accumulation of oil that was on the deck of that vessel."

Transcript, p. 8.

B. *Defendant's opening statement:*

" . . . What the claim is, is that there was an oil spill on the deck of this ship and that Mr. Brunner claims he slipped and fell because of this oil spill. . . . Is there any real proof, or any real evidence, or any proof that there was any oil at all on this deck? The

evidence will show that there wasn't and I think that will be the decision in the case. . . . ''

Transcript, pp. 9 and 14.

C. *Plaintiff's Closing Statement:*

" . . . The evidence has shown in this case Walter Brunner was caused to suffer injuries because of both negligence and unseaworthiness. Because of an accumulation of oil that was allowed to remain on the deck of OVERSEAS OHIO that caused him to fall. . . . That deck isn't slippery just because of rain. It is painted a nonslip, nonskid paint, just to prevent people from slipping in rain. It's got an abrasive surface on there. What makes it slippery is oil. Will make someone's feet go up in the air and make him feel embarrassed that someone is watching him is oil. That's the only thing that can do that . . . .''

Transcript, p. 263.

D. *Defendants' closing statement:*

"Now, in this particular case, I think we said in the beginning, it's really not that difficult in terms of the factual issues. The question is, was there an accumulation of oil on this deck. When you look at the facts . . . I think you have to conclude, no, there wasn't. That ends the case.''

Transcript, p. 270.

APPENDIX G

EXCERPTS FROM JURY CHARGE

A. "Plaintiff alleges the vessel was unseaworthy because there was oil on the deck of the vessel."

Transcript, p. 300.

B. "Plaintiff alleges defendant was negligent because he allowed oil to accumulate on the deck of the OVERSEAS OHIO, thereby creating a slippery condition in an area where the crew normally walked."

Transcript, p. 297.

C. Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

Transcript, p. 298.

D. A claim of unseaworthiness is a claim that the owner of a vessel has not fulfiled his duty to members of the crew to provide a vessel reasonably fit for its intended purpose. The duty to provide a seaworthy ship extends not only to the vessel itself, but to all of its parts, equipment and gear; and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate

the duty to anyone. If he does not provide a seaworthy vessel, then no amount of due care or prudence excuses him, whether he knew or could have known of the deficiency.

If, therefore, you find that a vessel was in any manner unsafe or unfit, and that such condition was a legal cause of damage to the Plaintiff, then you may find that the vessel was unseaworthy and the shipowner liable, without any reference to the issue of negligence of the Defendant or any of its employees.

The owner of the vessel is not required, however, to furnish an accident-free ship. A vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

Transcript, pp. 300-301.

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1504 (8)

In The
Supreme Court of the United States
October Term, 1985

MARITIME OVERSEAS CORPORATION,

and

SECOND SHIPMOR ASSOCIATES,

Petitioners,

vs.

WALTER R. BRUNNER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

LIST OF PARTIES

A. Those parties listed in the caption of the case.

B. The following parties may have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Walter R. Brunner
2. Maritime Overseas Corporation
3. Second Shipmor Associates
4. Assuranceforenigen GARD
5. The firm of KIERR, GAINSBURGH, BENJAMIN, FALLON & LEWIS
6. The firm of TERRIBERRY, CARROLL & YANCEY
7. The firm of BAKER, GARBER, DUFFY & BAKER
8. The firm of FREEDMAN, CRISPINO, HELWEIL & MAY
9. Robert K. Marzik

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Malm vs. United States Lines Co., 269 F.Supp. 731 (S.D.N.Y. 1967) affirmed 378 F.2d 941 (2d Cir. 1967) 1

Miller vs. Royal Netherlands Steamship Company, 508 F.2d 1103 (5th Cir. 1975) 5, 6

OTHER AUTHORITIES:

Rule 51, Federal Rules of Civil Procedure 4

SUMMARY OF ARGUMENT

The defendants in this case accepted without any objection a jury charge which explicitly instructed that the plaintiff had two separate theories of recovery which each had to be separately considered and evaluated by the jury. (The jury charge has been reproduced in its entirety as Appendix I to this Brief.) How then can they complain when the Jury did as they were told! If the defendants believed that the factual circumstances of this case required that only one theory of recovery go to the jury or that the two theories had to rise or fall together, it was their obligation to make this point to the Trial Court, and make a timely objection to the jury charges given. The jury's findings that the defendant was negligent but that the vessel was not unseaworthy are consistent with the instruction given and are not irreconcilably in conflict. The decision of the Fifth Circuit Court of Appeals affirming the judgment below should not be disturbed.

———o———

ARGUMENT

In this simple and straightforward seaman's case the defendants seek a reversal of the jury's verdict in favor of the plaintiff because the jury found the vessel owner negligent for allowing a dangerous accumulation of oil on the vessel's deck while at the same time finding the vessel seaworthy.

A similar argument was made years ago in *Malm vs. United States Lines Co.*, 269 F.Supp. 731 (S.D.N.Y. 1967),

affirmed 378 F.2d 941 (2d Cir. 1967). Judge Weinfeld's response then is pertinent to consider here:

> The fact that the jury found against the plaintiff on the unseaworthiness claim does not invalidate its verdict on the negligence claim. Inconsistent jury verdicts upon different counts or claims are not an anamoly in the law, which at times recognizes a jury's right to an idiosyncratic position, provided the challenged verdict is based upon the evidence and the law.

The Fifth Circuit in *Griffin vs. Matherne,* 471 F.2d 911 (5th Cir. 1973) has taken a similar view with respect to such alleged inconsistencies in jury verdicts holding that:

> The seventh amendment requires that if there is a view of the case which makes the jury's answers consistent, the Court must adopt that view and enter judgment accordingly.

Here, the Jury's answers are consistent with the instruction on the law they were given. For the Court made clear in its charge that the plaintiff's claims based upon the Jones Act and the General Maritime Law, respectively, represented distinct and separate theories of recovery with distinctly different meanings. Unlike the instructions given by the trial court in *Bernardini vs. Rederi A/B Saturnus,* 512 F.2d 660 (2d Cir. 1975), the Court here emphasized to the jury that the plaintiff's theories of recovery were to be considered independently of each other and that the plaintiff could recover *either* for negligence or unseaworthiness. In this regard, Judge Mentz charged the jury as follows:

> Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried separately before you; but in

> determining any fact in issue you may consider the testimony of all of the witnesses, regardless of who may have called them, and all the exhibits received in evidence regardless of who may have produced them.
>
> If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim. . .
>
> You should also remember that the plaintiff has asserted two separate claims. The first is for negligence under the Jones Act. The second is for unseaworthiness. The plaintiff may be entitled to recover damages provided he can establish *either* of his claims.
>
> So, if the evidence proves negligence *or* unseaworthness on the part of the defendant, which was a legal cause of damage to the plaintiff, you should award plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the plaintiff is reasonably certain to experience in the future.[1]
>
> (Emphasis added). (Transcript, pp. 296, 303)

The Court then defined and distinguished the two theories of recovery.

As to the Jones Act cause of action, the Court stated that "negligence on the part of the employer is a prerequisite to recovery under the Jones Act. . . . Negligence is the failure to use *reasonable care.*" (Transcript pp. 297, 298).

With respect to the plaintiff's claim under the General Maritime Law, the Court told the jury that the plaintiff had to prove that the vessel was unseaworthy

---

[1] It is important to note that Judge Mentz's charge is a verbatim quotation of the Pattern Fifth Circuit Jury Charges.

and that a "claim of unseaworthiness is a claim that the owner of a vessel has not fulfilled his legal duty to members of the crew to provide a vessel *reasonably fit for its intended purpose*". (Emphasis added). (Transcript, p. 300).

Nowhere did Judge Mentz instruct the jury that under the circumstances of this case "reasonable care" on the part of the defendants meant exactly the same thing as a "reasonably fit" vessel. But this is precisely what the defendants now claim is true. If this was the defendants' position, it was clearly encumbent upon them under our rules to make a proper objection to the charge as formulated by Judge Mentz. Rule 51 of the Federal Rules of Civil Procedure.

The jury's answers on unseaworthiness and negligence are *different*; but they are not irreconcilable. The jury could have concluded from the proof that although the defendant did not exercise ordinary care in allowing the deck to be made slippery by an accumulation of oil on the deck, the accumulation did not make the vessel unseaworthy. There was testimony that the deck's safety had been enhanced by non-skid paint, and it is reasonable to conclude from its verdict on the unseaworthiness count that the jury believed the defendant's proof in this regard. See *Kokesh v. American Steamship Co.*, 747 F.2d 1092 (6th Cir. 1984).

Alternatively, the jury could well have felt that it could not find that the vessel was "unseaworthy" since the plaintiff had been unable to produce any specific evidence as to the exact cause of the presence of oil on the deck. Since the plaintiff had not proven that the oil had accumulated because of a *defect* in the ship's gear, the

jury may well have thought that the plaintiff had not met its burden of proof on this issue.

In a very similar situation as presented here, the Fifth Circuit in *Miller vs. Royal Netherlands Steamship Company,* 508 F.2d 1103 (5th Cir. 1975) refused to set aside a jury's verdict which reached different conclusions with respect to negligence and unseaworthiness reasoning as follows:

> The District Court's lengthy instructions contained an explanation of the difference between negligence and unseaworthiness and cautioned the Jury that if they found both negligence and unseaworthiness, the Plaintiff could still recover only for one. Reason confirms that the Jury could have found negligence on the part of the ship owner in creating and failing to correct the list (since it was a finding that the evidence clearly would permit) but, mindful of the Court's instruction, simply did not pause to further consider whether the list also constituted an unseaworthy condition. In view of the mass of evidence and copious judicial instructions which this Jury faced, such a failure to appreciate the need to apply this legal concept is not only plausible but understandable. Indeed, considering that the Jury's function under Rule 49(a) is solely one of fact finding, a jury which had made a finding that the listing of the ship constituted negligence on the part of the ship owner, would not be bound to apply the legal consequences of such a finding, i.e., that negligence causing instability necessarily constituted an unseaworthy condition of the ship. This could be done by the Court. Since this logical and probable rationalization of the Jury's answers exists, the verdict must be accepted. Even though equally persuasive possibilities that would produce reversal might be shown to exist, our inquiry ends here.

Since there are several ways to explain and reconcile the Jury's decisions with respect to negligence and unseaworthiness, its verdict should not be disturbed. *Griffin vs. Matherne, supra, Miller vs. Royal Netherlands Steamship Company, supra.*

CONCLUSION

For the reasons stated the defendant's Petition for Certiorari should be denied.

Respectfully submitted,

KIERR, GAINSBURGH, BENJAMIN,
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APPENDIX A

THE COURT: Ms. Lambert, will you give each member of the jury a copy of these instructions.

(Whereupon the jury was handed a copy of the instructions.)

THE COURT: Ladies and gentlemen: These are your jury instructions. You won't be able to take them into the jury room. But I will ask you to follow along with me as I read the instructions to you.

Members of the jury, now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case. It is your duties as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law as stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed

by prejudice, or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as it's agents or employees, and in general, any agents or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority, delegated to him by the corporation or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts and in so doing you must consider only the evidence I have admitted into the case. The term evidence includes the sworn testimony of the witnesses and the exhibits admitted into the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case.

And in so doing to call to your attention certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also during the course of the trial, I occasionally make comments to the lawyers or ask questions of a witness or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense leads you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant, his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or

acquire knowledge concerning the facts about which he testified; his candor, his fairness, and intelligence; and to the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of the witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness maybe discredited or impeached by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provides if scientific or technical or other specialized knowledge might assist the jury in understanding the evidence, or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

In a civil action such as this, each party asserting a claim, as hereafter described, has the burden of proving every essential element of his claim by a preponderance of the evidence.

A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it separately as you would had each claim been tried separately before you; but in determining any fact in issue, you may consider the testimony of all the witnesses, regardless of who may have called them and all the exhibits received in evidence, regardless of who may have produced them.

If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

Plaintiff's first claim is asserted under the Jones Act. The Jones Act is a federal statute which provides

a remedy to any seaman who suffers personal injuries in the course of his employment due to the negligence of his employer or the employer's officers, agents, or other employees. The right of action afforded by the Jones Act is available only to a member of a crew of a vessel in navigation.

This statute did not make the employer the accident insuror of the seaman, however, an negligence on the part of the employer is a prerequisite to recovery under the Jones Act. Specifically, plaintiff alleges that the defendant was negligent because we allowed oil to accumulate on the deck of the M/V Overseas Ohio, thereby creating a slippery condition in an area where the crew normally walked.

So, in order to prevail on his claim under the Jones Act, the plaintiff must establish each of the following elements by a preponderance of the evidence:

First, that at the time of his injury the plaintiff was acting in the course of his employment as a member of the crew of a vessel in navigation.

This element is stipulated by the parties.

Second, that the defendant was negligent as claimed.

Third, that such negligence was a legal cause of damage sustained by the plaintiff.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in this case that any negligence of the defendant contributed in any way toward the injury or damages suffered by the plaintiff, you may find that such injury or damage was legally caused by the defendant's omission.

Negligence maybe a legal cause of damage, even though it operates in combination with the act of another, some natural cause or some other cause, if such cause occurs at the same time as the negligence, and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the plaintiff's Jones Act claim for negligence, then your verdict should be for the defendant. If, however, a preponderance of the evidence does support the plaintiff's claim, you will then consider the defense raised by the defendant.

THE DEFENDANT CONTENDS:

First, that there was no accident; or

Second, that the plaintiff was negligent and that such negligence was the sole or a contributing legal cause of the plaintiff's damage.

These are defensive claims and the burden of proving either claim by a preponderance of the evidence is upon the defendant.

A person working aboard a vessel is charged with the responsibility of looking and seeing where he works.

All persons are required to exercise ordinary and reasonable care for their own safety. If you find that the plaintiff was injured because he failed to exercise ordinary care, then plaintiff is not entitled to recover from defendant for that portion of his damages attributable to his own negligence.

If you find in favor of the defendant on this defense, that will not necessarily prevent recovery by the plaintiff. It only reduces the amounts of the plaintiff's recovery. In other words, if you find that the accident was due partly to the plaintiff, then his own negligence was, for example, ten percent responsible for his own damage, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would not prevent the plaintiff from recovery. The court will merely reduce the plaintiff's total damages by the percentage that you insert. Of course, by using the number ten percent as an example, I do not mean to suggest to you any specific figure at all. If you find that the plaintiff was negligent, you might find one percent or 100 percent.

Plaintiff's second claim is for unseaworthiness. Specifically the plaintiff alleges that the vessel was unseaworthy because there was oil on the deck of the vessel. So in order to prevail on his unseaworthiness claim, the plaintiff must establish each of the following elements by a preponderance of the evidence:

First, that the vessel was unseaworthy, as claimed.

Second, that the unseaworthy condition was a legal cause of damage to the plaintiff.

A claim of unseaworthiness is a claim that the owner of a vessel has not fulfilled his legal duty to members of the crew to provide a vessel reasonably fit for it's intended purpose.

The duty to provide a seaworthy ship extends not only to the vessel itself, but to all it's parts, equipment and gear, and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate the duty to anyone. If he does not provide a seaworthy vessel, then no amount of due care or prudence excuses him, whether he knew or could have known of the deficiency.

If, therefore, you find that the vessel was in any manner unsafe or unfit, and that such condition was a legal cause of the damage to the plaintiff, then you may find that the vessel was unseaworthy and the ship owner liable without any reference to the issues of negligence of the defendant or any of it's employees.

The owner of the vessel is not required, however, to furnish an accident-free ship. The vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for it's intended use and a crew that is reasonably competent and adequate.

Unlike the Jones Act claim with respect to which the plaintiff may recover if the alleged negligence is proved to be a slight cause of the injury sustained, in order to recover on a claim of unseaworthiness, it must be proved that the unseaworthy condition was a substantial cause of the injury complained of.

Thus, an unseaworthy condition is a legal cause of damage only if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage, so it can reasonably be said that except for the unseaworthy condition, the loss, injury or damage would not have occurred.

Even so, unseaworthiness maybe a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause, if such other cause occurs at the same time as the unseaworthiness and if the unseaworthiness contributes substantially to producing such damage.

Similar to the response it made to plaintiff's first claim, the defendant denies that any unseaworthiness existed at the time of the accident, and alternatively, states that if the vessel was unseaworthy, then the unseaworthiness did not cause any damage or injury to the plaintiff. The defendant further alleges that some contributory negligence on the part of the plaintiff himself was a cause of any injuries he may have sustained. Since I have already explained to you the meaning and effect of a finding of contributory negligence on the part of the plaintiff, I will not do so again, except to remind you that the defendant has the burden of establishing this defense by a preponderance of the evidence.

You should also remember that the plaintiff has asserted two separate claims. The first is for negligence under the Jones Act. The second is for unseaworthiness. The plaintiff maybe entitled to recover damages provided he can establish either of his claims.

So if the evidence proves negligence or unseaworthiness on the part of the defendant which was a legal cause

of damage to the plaintiff, you should award the plaintiff an amount of money that will fairly and adequately compensate him for such damage, including any damage the plaintiff is reasonably certain to experience in the future.

In considering the issue of plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages, no more or no less, damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. Neither can damages be based on speculation, because it is only actual damages, what the law calls compensatory damages, that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money. They cover both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff. That is, to make him whole or as he was immediately prior to his injuries.

You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence and no others.

Any bodily injury sustained by the plaintiff and any resulting pain and suffering, disability, mental anguish and loss of capacity for enjoyment of life experienced in the past or to be experienced in the future. No evidence of the value of such intangible thing as mental or physical pain and suffering has been or needs be intro-

duced. In that respect, it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

Any loss of ability to earn money sustained in the past and any such loss in the future.

In determining the reasonably certain work-life expectancy of the plaintiff, the jury should consider, in addition to the evidence received on work-life expectancy, all other facts and circumstances in evidence in the case bearing upon the work-life expectancy of the plaintiff, including his occupation, habits, past health record and present state of health.

I think it is fair to say, Mr. Kullman, in this case, evidence of the work-life expectancy was not introduced because you had, you were asking for five years, is that correct?

MR. KULLMAN: Yes.

THE COURT: In many cases the United States Department of Commerce has all of these figures and the attorneys simply introduce the little booklet.

All right. Continuing on the next page.

If the jury should find that the evidence establishes a reasonable likelihood of a loss of future earnings, then

it becomes the duty of the jury to ascertain the present worth in dollars of such future damages, since an award of future damages necessarily requires a payment be made now for a loss that will not actually be sustained until some future date.

In computing plaintiff's future loss of earning capacity, you may consider individual factors, such as promotions, merit or senority raises that plaintiff would have received during the course of his work life to the extent that you found such increases supported by a preponderance of the evidence.

Under these circumstances, the result is that the plaintiff will, in effect, be reimbursed in advance of the loss, and will have the use of money which he will not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free of money representing a lump-sum payment of anticipated future loss, the law requires that the jury discount or reduce to it's present worth the amount of the anticipated future loss by taking, first, the REA or below market interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with, two, the period of time over which the future loss is reasonably certain to be sustained. And then reduce or in effect deduct from the total amount of anticipated future loss, whatever the amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time, and include in the verdict an award only for the present worth the total amount of anticipated future loss. The real or below market inter-

est rate is the after tax return on a risk-free investment offset by the estimated rate of general future price inflation. Many economists believe that the appropriate discount factor is between one percent to three percent per year.

Bear in mind that your duty to discount to the present value applies to loss of future earnings.

If you should find that the plaintiff is entitled to damages for future pain and suffering or future mental anguish, then such award is not subject to any reduction to present use.

You are instructed that aany person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to mitigate those damages. That is, to take advantage of any reasonable opportunity he may have had under the circumstances to refuse or minimize the loss of damage.

So if you should find from a prepondence of the evidence that the plaintiff within the limitations of any disability he may have sustained failed to seek out or take advantage of a business or employment opportunity that was reasonably available to him under all the circumstances shown by the evidence, then you should reduce the amount of his damages by the amount he could have reasonably realized if he had taken advantage of such opportunity.

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in anyway as an indication that I believe the plaintiff should or should not prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. It is your duty as jurors to consult with one another and deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not part partisans. You are judges, judges of the facts, your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

Ladies and gentlemen, I will give the verdict to the marshall, but this verdict is in the form of questions and answers. It's an interrogatory-type verdict, and as we mentioned in the instructions, you have got a Jones Act claim and unseaworthiness and contributory negligence claim. So your first interrogatory is to the effect: was the . . .